**DATO' SERI ANWAR IBRAHIM** A

**v.**

**TUN DR MAHATHIR MOHAMAD**

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: W-02-609-2007]
2 NOVEMBER 2009 C

***ADMINISTRATIVE LAW:*** *Judicial proceedings - Courts - Mandatory to use National language in courts - Memorandum of appeal filed in English language incurably defective*

***CIVIL PROCEDURE:*** *Appeal - Appeal to Court of Appeal - Defective memorandum and record of appeal - Memorandum of appeal filed in English language - Memorandum of appeal not signed by appellant's solicitors - Memorandum of appeal undated - Failure to file chronology of events - Failure to attach proper index to Part "C" of record of appeal - Documentary exhibits in record of appeal not separately indexed - Memorandum and record of appeal defective - Appeal not properly brought and therefore dismissed - Rules of the Court of Appeal 1994, rr. 18(10), 101* D E

***CIVIL PROCEDURE:*** *Appeal - Memorandum and record of appeal - Defective - Memorandum of appeal filed in English language - Memorandum of appeal not signed by appellant's solicitors - Memorandum of appeal undated - Failure to file chronology of events - Failure to attach proper index to Part "C" of record of appeal - Documentary exhibits in record of appeal not separately indexed - Memorandum and record of appeal defective - Appeal not properly brought before Court of Appeal* F G

***CONSTITUTIONAL LAW:*** *National language - Use of National language in courts - Mandatory to use National language in courts - Memorandum of appeal filed in English language incurably defective - Federal Constitution, art. 152 - National Language Act 1963/1967, s. 8 - Interpretation Acts 1948 and 1967, s. 3* H

The appellant had sued the respondent for an alleged defamation. The High Court had allowed the respondent's application to strike out the appellant's writ of summons and statement of claim. The appellant appealed against this decision. The respondent filed a I

notice of motion (encl. 25a) seeking that the appellant's record of appeal be struck out and/or set aside pursuant to art. 152 of the Federal Constitution and/or s. 8 of the National Language Acts 1963/1967 ('Act 32') and/or s. 3 of the Interpretation Acts 1948 and 1967 ('Act 388') and/or r. 101 of the Rules of the Court of Appeal 1994 ('RCA') and/or pursuant to the inherent jurisdiction of this court. The respondent also claimed that the record of appeal did not contain certain exhibits exhibited in one of the respondent's affidavit. The appellant on the other hand filed a notice of motion (encl. 29a) seeking leave to file and to serve an additional appeal record containing the memorandum of appeal in the Malay language.

**Held (allowing encl. 25a and dismissing encl. 29a with costs) Per Abdul Malik Ishak JCA:**

**(1)** The absence of the memorandum of appeal in the National Language rendered the appellant's record of appeal incurably defective and consequently, the appellant's appeal must be dismissed as there was no proper record of appeal before the court. (para 48)

**(2)** The importance of the Malay Language as the national language cannot be taken lightly. The mandatory provisions of art. 152 of the Federal Constitution read together with s. 8 of Act 32 and s. 3 of Act 388 must be adhered to. It requires the appellant to file the memorandum of appeal in the National Language. No other language will be entertained. The failure of the appellant to do so amounted to a blatant breach which compelled the court to conclude that no memorandum of appeal had been filed at all. (paras 49 & 50)

**(3)** The purported memorandum of appeal in the English language was also not signed by the appellant's solicitors thereby rendering it invalid. The purported memorandum of appeal in the English language was also undated. This meant that the purported memorandum of appeal was defective and invalid. (paras 57, 58 & 59)

**(4)** The appellant's failure to file the chronology of events in contravention of r. 18(10) of the RCA as well as the Practice Direction No. 3 of 1992 pointed to the conclusion that the appellant's appeal was not properly brought before the court and therefore should be dismissed. (para 62)

**(5)** The appellant also failed to attach a proper index to Part "C" of the record of appeal with the documentary exhibits not separately indexed. The appellant had failed to comply with the requirements of the Practice Direction No. 2 of 1985. Such non-compliance was fatal and the record of appeal ought to be struck out. (paras 64, 65 & 67)

**(6)** The respondent's counsel had alerted the appellant's counsel as to the proposed actions that would be taken if the exhibits were not included in the appeal record. There was ample opportunity for the appellant's counsel to rectify the appeal record. For the whole year of 2008, the appellant's counsel remained idle. The respondent's counsel therefore did not ambush the appellant's counsel in respect of encl. 25a. (para 71)

**(7)** Pursuant to O. 92 r. 4 of the RHC, the filing of the memorandum of appeal in the English language constituted an injustice to the respondent and it was, pure and simple, an abuse of the process of the court. (para 76)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah menyaman responden berkaitan satu dakwaan fitnah. Mahkamah Tinggi telah membenarkan permohonan responden untuk membatalkan writ saman dan penyata tuntutan perayu, dan perayu merayu terhadap keputusan tersebut. Responden kemudian memfailkan notis usul (lampiran 25a) memohon supaya rekod rayuan perayu dibatalkan dan/atau diketepikan, berdasarkan fasal 152 Perlembagaan Persekutuan dan/atau s. 8 Akta-Akta Bahasa Kebangsaan 1963/1967 ('Akta 32') dan/atau s. 3 Akta-Akta Tafsiran 1948 dan 1967 ('Akta 388') dan/atau k. 101 Kaedah-Kaedah Mahkamah Rayuan ('KKMR') dan/atau berasaskan bidangkuasa semulajadi mahkamah. Responden juga menghujahkan bahawa rekod rayuan tidak mengandungi eksibit-eksibit tertentu yang dipamerkan dalam salah satu afidavit perayu. Perayu membalas dengan memfail notis usul (lampiran 29a) memohon untuk memfail dan menyerahkan rekod rayuan tambahan yang mengandungi memorandum rayuan dalam Bahasa Malaysia.

**Diputuskan (membenarkan lampiran 25a dan menolak lampiran 29a dengan kos):**
**Per Abdul Malik Ishak JCA:**

**(1)** Ketiadaan memorandum rayuan dalam Bahasa Kebangsaan telah menyebabkan rekod rayuan perayu menjadi cacat yang tak dapat dipulihkan lagi. Oleh itu, rayuan perayu terpaksa ditolak kerana tiada rekod rayuan yang teratur di hadapan mahkamah.

**(2)** Soal peri mustahaknya Bahasa Melayu sebagai Bahasa Kebangsaan tidak boleh dipandang ringan. Peruntukan mandatori fasal 152 Perlembagaan Persekutuan dibaca bersama s. 8 Akta 32 dan s. 3 Akta 388 adalah wajib dipatuhi. Ia menuntut perayu supaya memfailkan memorandum rayuan dalam Bahasa Kebangsaan. Penggunaan bahasa yang selainnya adalah tidak dilayan. Kegagalan perayu berbuat demikian adalah terang-terangan satu pelanggaran, dan mahkamah boleh merumuskan bahawa tiada apa-apa memorandum rayuan telah difailkan.

**(3)** Memorandum rayuan dalam Bahasa Inggeris yang difailkan tersebut tidak ditangani oleh peguamcara perayu, sekaligus menjadikannya tidak sah. Memorandum rayuan berbahasa Inggeris tersebut juga tidak bertarikh. Ini bermakna memorandum rayuan tersebut adalah cacat dan tak sah.

**(4)** Kegagalan perayu memfailkan kronologi peristiwa-peristiwa dan sekaligus melanggar kehendak k. 18(10) KKMR serta Arahan Amalan No. 3 Tahun 1992 telah membangkitkan rumusan bahawa rayuan tersebut tidak dikemukakan dengan teraturnya di hadapan mahkamah dan kerana itu harus ditolak.

**(5)** Perayu gagal mengepilkan satu indeks yang teratur di Bahagian "C" rekod rayuan berakibat eksibit-eksibit dokumentar telah tidak diindekskan dengan secara yang berasingan. Perayu dengan itu gagal mematuhi kehendak Arahan Amalan No. 2 Tahun 1985. Ketidakpatuhan ini adalah fatal dan rekod rayuan haruslah dibatalkan.

**(6)** Peguam responden telah memaklumkan kepada peguam perayu tentang bakal tindakan yang akan diambil jika eksibit-eksibit tidak dimasukkan di dalam rekod rayuan. Maka terdapat peluang yang mencukupi bagi peguam perayu memperbetulkan rekod rayuan. Namun, peguam perayu tidak berbuat apa-apa

di sepanjang tahun 2008. Oleh itu, tidak ada perbuatan serang hendap dilakukan oleh peguam responden terhadap peguam perayu berhubung lampiran 25a.

(7) Berdasarkan A. 92 k. 4 KMT, pemfailan memorandum rayuan di dalam Bahasa Inggeris adalah suatu ketidakadilan kepada responden, dan ia jelas suatu penyalahgunaan proses mahkamah.

**Case(s) referred to:**

*Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor [2002] 3 CLJ 357 CA* ***(refd)***

*Connelly v. Director of Public Prosecutions [1964] AC 1254* ***(refd)***

*Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2007] 5 CLJ 118 HC* ***(refd)***

*Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2008] 6 CLJ 325 CA* ***(refd)***

*Duport Steels Ltd and Others v. Sirs and others [1980] 1 All ER 529* ***(refd)***

*Govind Lal Chaggan Lal Patel v. The Agriculture Produce Market Committee and Others, AIR [1976] SC 263* ***(refd)***

*Kerajaan Negeri Pahang Darul Makmur & Anor v. Seruan Gemilang Makmur Sdn Bhd [2008] 6 CLJ 611 CA* ***(refd)***

*M/s Sainik Motors, Jodhpur and Others v. State of Rajasthan, AIR [1961] SC 1480* ***(refd)***

*Regina v. Jefferies [1968] 3 WLR 830* ***(refd)***

*State of Uttar Pradesh and Others v. Babu Ram Upadhya, AIR [1961] SC 751* ***(refd)***

*State of UP v. Manbodhan Lal Srivastava, and Manbodhan Lal Srivastava v. State of UP, AIR [1957] SC 912* ***(refd)***

*Yu Oi Yong & Anor v. Ho Toong Peng & Ors [1977] 1 MLJ 120* ***(refd)***

*Zainun Hj Dahan lwn. Rakyat Merchant Bankers Bhd & Satu Lagi [1997] 4 CLJ Supp 279 HC* ***(refd)***

**Legislation referred to:**

Federal Constitution, art. 152(1)
Interpretation Acts 1948 and 1967, s. 3
National Language Act 1963/1967, s. 8
Rules of the Court of Appeal 1994, rr. 18(1), (6), (10), 21(2), (3), 101
Rules of the High Court 1980, O. 92 r. 4

*For the appellant - Karpal Singh (SN Nair, Wan Anuar Shaddat Mohamed Amin & Nicholas Netto with him); M/s SN Nair & Partners*

*For the respondent - Dato' VK Lingam (R Thayalan with him); M/s VK Lingam & Co*

A *[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-23-15-2006]*

*[Editor's note: For the High Court judgment, please see Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2007] 5 CLJ 118.]*

*Reported by Amutha Suppayah*

B

## JUDGMENT

**Abdul Malik Ishak JCA:**

C

**Introduction**

**[1]** There were two enclosures for our consideration. The first one was encl. 25a which was a notice of motion filed by the respondent (Tun Dr Mahathir bin Mohamad). The second was encl. 29a which was also a notice of motion filed by the appellant (Dato' Seri Anwar bin Ibrahim). We heard these two enclosures simultaneously.

D

**[2]** The notice of motion in encl. 25a sought to move this court for the following orders pursuant to art. 152 of the Federal Constitution and/or s. 8 of the National Language Acts 1963/1967 (Act 32) and/or s. 3 of the Interpretation Acts 1948 and 1967 (Act 388) and/or r. 101 of the Rules of the Court of Appeal 1994 and/or pursuant to the inherent jurisdiction of this court:

E

F

1. The appellant's record of appeal filed in the appellant's appeal herein be struck out and/or set aside.

2. Consequently, the appellant's appeal herein be dismissed with costs.

G

3. The costs of this application shall be borne by the appellant.

**[3]** While the notice of motion in encl. 29a sought for the following prayers:

H

1. That the applicant appellant be allowed to file this application out of time.

2. That the applicant appellant be allowed to file and to serve the additional appeal record containing the memorandum of appeal in the Malay language within 21 days from the date of this order.

I

3. The costs of the application to be borne by the applicant appellant.

4. Any other order or relief which this court deems fit and suitable.

**[4]** Enclosure 25a was supported by an affidavit of the respondent that was affirmed on 1 October 2009. The reply to this affidavit was affirmed by Wan Anuar Shaddat bin Mohamed Amin ("Shaddat") on 6 October 2009 and it was styled as an affidavit in reply of the appellant. R Thayalan a/l Retanavalu responded on behalf of the respondent and he affirmed an affidavit on 16 October 2009.

**[5]** Whereas encl. 29a was supported by an affidavit in encl. 29b that was affirmed by Shaddat on 16 October 2009. For want of time and for expediency, the respondent relied on their affidavits pertaining to encl. 25a by way of a rebuttal in countering encl. 29a through a "notis niat untuk merujuk kepada afidavit terdahulu" dated 20 October 2009 marked as encl. 31.

## The Background Facts

**[6]** By way of a writ of summons and the statement of claim dated 27 January 2006, the appellant sued the respondent for an alleged defamation. The appellant had claimed that the respondent had defamed him during a press conference on 9 September 2005 at the premises of the Malaysian Human Rights Commission (SUHAKAM) at Kuala Lumpur and published in the website of Malaysiakini under the heading "Nobody will be safe from a 'gay' PM says Dr. M". It was also published and reported in the Agence France-Presse (AFP), Singapore Business Times, Straits Times Singapore, The Associated Press (AP), The Age newspaper in Melbourne and other publications.

**[7]** It seems that the appellant had claimed from the respondent compensatory damages, aggravated damages, exemplary damages, injunction, interests, costs and other reliefs deemed fit by the court. The respondent has since filed his defence against the appellant's suit on 14 April 2006. On 25 July 2006, the appellant filed his reply to the defence and subsequently amended it by way of a court order dated 15 February 2007.

**[8]** On 5 January 2007, the respondent filed a summons in chambers application to strike out the appellant's writ of summons and the statement of claim in its entirety and alternatively paras 6 and/or 7 and/or 8 and/or 9 and/or 11 and/or 12 of the statement of claim and/or that paras 13 and/or 14 and/or 15 and/or 16 and/or 17 and/or 18 and/or 19 and/or 20 of the amended reply be struck out.

**[9]** On 4 July 2007, the High Court had allowed the respondent's application and struck out the appellant's writ of summons and the statement of claim in its entirety with costs. The appellant, being dissatisfied with the decision of the High Court, had on 5 July 2007 filed the appeal to this court. The decision of the High Court has since been reported *vide Dato' Seri Anwar Ibrahim v. Tun Dr. Mahathir Mohamad* [2007] 5 CLJ 118, HC.

**[10]** The respondent has been advised by his solicitors to say that there were disputes between the appellant's solicitors Messrs S N Nair & Partners and his solicitors pertaining to the documents to be included in the record of appeal.

**[11]** On 22 August 2007, Messrs S N Nair & Partners wrote to the deputy registrar of the High Court of Kuala Lumpur seeking an appointment to resolve the dispute as to the documents to be placed in the record of appeal.

**[12]** Notwithstanding the letter to the deputy registrar of the High Court of Kuala Lumpur dated 22 August 2007, the appellant had also filed a notice of motion to this court on 30 August 2007 for the following reliefs:

(i) that the appellant be granted an extension of 21 days to file the record of appeal from the date of the orders made therein;

(ii) the index of the record of appeal and the exhibits be determined by this court; and

(iii) that costs be made costs in the cause.

**[13]** The respondent continue to aver that on 30 August 2007, the appellant's solicitors had also served on the respondent's solicitors a copy of the record of appeal without the exhibits as exhibited in the respondent's affidavit in support affirmed on 4 January 2007.

**[14]** The appellant's notice of motion was originally fixed for hearing on 29 January 2008. The respondent's solicitors had affirmed an affidavit in reply on 24 January 2008 and filed on 25 January 2008 for the purpose of opposing the appellant's application.

**[15]** On 29 January 2008, this court had directed that the dispute pertaining to the index to the record of appeal be determined by the deputy registrar of the High Court pursuant to r. 18(6) of the Rules of the Court of Appeal 1994 and this court then adjourned the appellant's notice of motion to a date to be fixed.

**[16]** On 3 April 2008, the deputy registrar of the High Court heard arguments from counsel on both sides in regard to the inclusion of the documents in the record of appeal. It was on 9 April 2008 that the deputy registrar of the High Court gave his decision and held that all the exhibits must be included in the record of appeal.

**[17]** By letter dated 11 April 2008, the appellant's solicitors Messrs S N Nair & Partners informed the registrar of this court that the appellant was dissatisfied with the decision of the deputy registrar of the High Court in allowing the inclusion of all the exhibits and requested that the appellant's notice of motion be fixed for hearing.

**[18]** This court then fixed the appellant's notice of motion for hearing on 9 July 2008 and it was subsequently heard on 10 July 2008.

**[19]** On 10 July 2008, this court made the following orders:

(i) that the appellant's first relief in the notice of motion for the extension of 21 days to file and serve the record of appeal was allowed;

(ii) that the appellant's second relief in the notice of motion was dismissed; and

(iii) that costs of the application be costs in the cause.

**[20]** The judgment of this court has since been reported *vide Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2008] 6 CLJ 325, CA.

**[21]** By letter dated 28 July 2008 Messrs S N Nair & Partners served on the respondent's solicitors a copy of the purported record of appeal together with all the exhibits.

**[22]** By notice dated 27 May 2009, this court informed the parties that the appeal of this case has been fixed for case management on 4 June 2009. But the appellant's solicitors by letter dated 29 May 2009 wrote to this court seeking an adjournment of the case management on 4 June 2009 as Sankara Nair will be in the United Kingdom from 30 May 2009 to 6 June 2009. And so this court by notice dated 1 June 2009 agreed to adjourn the case management from 4 June 2009 to 25 June 2009.

**[23]** However, on 25 June 2009, this court had fixed the appeal herein for hearing during the week commencing on 2 November 2009. And, accordingly, the parties have been notified by notice dated 2 July 2009 from the registry of this court that the hearing date of this appeal has been scheduled for the week commencing 2 November 2009.

**[24]** With these background facts, the respondent through his solicitors filed the notice of motion in encl. 25a which was dated 2 October 2009.

**[25]** The affidavit in reply of the appellant that was affirmed by Shaddat on 6 October 2009 challenged the notice of motion in encl. 25a and alleged that there was an unreasonable delay in filing the said enclosure. He also alluded to what had happened during the case management on 25 June 2009. He averred that during the case management before the deputy registrar, he appeared as counsel for the appellant while R. Thayalan appeared as counsel for the respondent. He averred that R. Thayalan had confirmed that the cause papers were in order and after hearing such confirmation the deputy registrar forthwith fixed the hearing date of the appeal on 2 November 2009.

**[26]** Shaddat further deposed that during the case management, R. Thayalan never raised any objection or issue in regard to the appeal record like what was alleged in the notice of motion in encl. 25a as well as in the affidavit in support affirmed by the respondent on 1 October 2009.

**[27]** Shaddat averred that he verily believed that the reasons stipulated in encl. 25a and in the affidavit in support that was affirmed by the respondent do not warrant the record of appeal or the appeal itself to be struck off.

**[28]** Shaddat then categorically said that the failure to comply with the rules are curable. He too said that the non-compliance with the rules do not prejudice the respondent.

**[29]** In serious tone Shaddat deposed that the appellant should not be penalised for the omissions and that the decision of this court must be based on justice.

**[30]** Finally, Shaddat asked this court to dismiss the respondent's application in encl. 25a with costs.

**[31]** R. Thayalan rose up to the occasion and he affirmed an affidavit in rebuttal. He said that there was no unreasonable delay. He too said that legal objections can be raised at anytime before or at the time of the hearing of the appeal.

**[32]** R. Thayalan went into specifics. He said that it was true that on 25 June 2009, he represented the respondent during the case management before the deputy registrar. He emphasised that the case management was for the purpose of fixing the date for hearing of the appeal and not for the purpose of hearing any issues in relation to the appeal nor for the purpose of raising objections in regard to the validity (kesahihan) of the appeal record. That the notice from this court in regard to the case management alluded to the following information that has to be supplied:

(a) whether the appeal or the counter appeal would proceed;

(b) the suitable dates;

(c) the time taken for submission; and

(d) other matters that need to be raised in order to ensure that the appeal will proceed expeditiously.

**[33]** R. Thayalan categorically said that he did not confirm that the cause papers were in order as alleged. He too said that the deputy registrar of this court did not ask whether the cause papers were in order or not.

**[34]** However, R. Thayalan did say that the appellant had filed the record of appeal during the case management. But he denied that he had confirmed that the contents of the appeal record were in order as alleged by the appellant's counsel.

**[35]** R. Thayalan said that the appeal was fixed based on the confirmation that the appeal record was filed and not based on his confirmation whether the cause papers were in order.

**[36]** R. Thayalan believed that there were no reasons for the appellant to object to the respondent's application in encl. 25a and that as an easy way out the appellant's counsel had created and twisted the facts as to what had actually happened during case management.

**[37]** In regard to the issue that R. Thayalan did not raise any objection pertaining to the record of appeal during case management, he had this to say. That that issue did not arise at all because as stated earlier the issues pertaining to the validity (kesahihan) of the appeal record cannot be determined by the deputy registrar but rather by this court.

**[38]** R. Thayalan then made general averments in regard to Shaddat's affidavit by stating that mere denials do not require any response and that legal issues will be raised during the hearing of the notice of motion in encl. 25a. For these reasons, he prayed for an order in terms of encl. 25a.

**[39]** In support of the notice of motion in encl. 25a, the respondent made the following pertinent points in his affidavit as seen at pp. 30A, 31A and 32A of encl. 25a. We now reproduce them *verbatim*:

> **Defects in the Record of Appeal**
>
> 30. I am advised by my solicitors and verily believe such advice to be true that:
>
> (1) In blatant disregard to the provisions of Article 152 of the Federal Constitution read together with Section 8 of the National Language Acts, 1963/1967 (Act 32) and/or Section 3 of the Interpretation Acts, 1948 and 1967 (Act 388) and/or Rule 101 of the Rules of the Court of Appeal, 1994, the Appellant had included a purported Memorandum of Appeal in the Record of Appeal only in the English language and not in the National Language.
>
> (2) The purported Memorandum of Appeal, not only being in the English language, is also not signed by the Appellant's solicitors, thus rendering the purported Memorandum of Appeal invalid and of no effect.

(3) The purported Memorandum of Appeal is dated "... day of August 2007" without any specific date. In any event, the Memorandum could not be dated August 2007 when the same was only served upon my solicitors on 28-7-2008. This too renders the purported Memorandum of Appeal defective and invalid.

(4) The above defects in the Memorandum of Appeal are also in contravention of Rule 18(3) read together with Form 3 of the First Schedule of the Rules of the Court of Appeal, 1994.

(5) I believe that the Appellant had also, in breach of Rule 18(10) of the Rules of the Court of Appeal, 1994 had not submitted and served the Chronology of Events as required.

(6) The Appellant had also failed to attach a proper index to Part 'C' of the Record of Appeal with the documentary exhibits not separately indexed.

(7) Thus, there is no valid Memorandum of Appeal filed by the Appellant in respect of the appeal herein and consequently, the Record of Appeal which consists of the copies of the proceedings in the High Court attached to the Memorandum of Appeal is incurably defective and ought to be set aside.

31. On 29-6-2009, my solicitors have caused a file search to be conducted at the Court of Appeal which revealed that the Record of Appeal filed by the Appellant at the Court of Appeal also consists of similar defects stated above. A copy of the Official Receipt for the fees paid in respect of the search conducted on 29-6-2009 is annexed hereto and marked as Exhibit 'MM-15'.

32. By reason of all the matters deposed above, I am advised by my solicitors and verily believe such advice to be true that the several defects in the Memorandum of Appeal render the Record of Appeal incurably defective and the Appellant's appeal is not properly brought before this Honourable Court. I am further advised that the several defects in the Memorandum of Appeal as set out above cannot be mistakes as the Appellant had intentionally filed the Memorandum of Appeal with those defects even in the first incomplete Record of Appeal served on my solicitors on 30-8-2007 (Exhibit 'MM-5' above).

A 33. I accordingly pray for an order in the terms of the Notice of Motion Application herein.

**[40]** Shaddat's affidavit in encl. 29b that was affirmed on 16 October 2009 in support of the appellant's notice of motion in encl. 29a repeated the facts that have been said by him in his own affidavit in reply that was affirmed on 6 October 2009 in response to the notice of motion in encl. 25a and we need not repeat them here again. Suffice for us to say that the core of Shaddat's affidavit that was affirmed on 16 October 2009 merely emphasised on the need to file an additional appeal record containing the memorandum of appeal in the Malay language and his assertion that such an application as per encl. 29a would not prejudice the respondent in any way whatsoever.

**Analysis**

**[41]** Shaddat's two affidavits – one challenging encl. 25a and the other supporting encl. 29a, do not deny the existence of the several defects in the record of appeal as alluded to by the respondent in his supporting affidavit.

**[42]** We have seen the memorandum of appeal and it is obvious that it is not drafted in Bahasa Malaysia. The supremacy of Bahasa Malaysia or the Malay Language in our courts cannot be denied. Pursuant to art. 152 of the Federal Constitution read together with s. 8 of the National Language Acts 1963/1967 (Act 32) as well as s. 3 of the Interpretation Acts 1948 and 1967 (Act 388), all proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any subordinate court shall be in the National Language. And according to art. 152(1) of the Federal Constitution, the National Language shall be the Malay Language.

**[43]** It would be ideal, at this juncture, to reproduce herein these relevant provisions of the law.

**[44]** Article 152 of the Federal Constitution – our supreme law, states as follows:

**152. National language.**

(1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide:

Provided that:

(a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and

(b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

(2) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, the English language may be used in both Houses of Parliament, in the Legislative Assembly of every State, and for all other official purposes.

(3) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, the authoritative texts:

(a) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament; and

(b) of all Acts of Parliament and all subsidiary legislation issued by the Federal Government,

shall be in the English language.

(4) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, all proceedings in the Federal Court, the Court of Appeal or a High Court shall be in the English language:

Provided that, if the Court and counsel on both sides agree, evidence taken in language spoken by the witness need not be translated into or recorded in English.

(5) Notwithstanding the provisions of Clause (1), until Parliament otherwise provides, all proceedings in subordinate courts, other than the taking of evidence, shall be in the English language.

(6) In this Article, 'official purpose' means any purpose of the Government, whether Federal or State, and includes any purpose of a public authority.

**[45]** Section 8 of the National Language Acts 1963/1967 (Act 32) enacts as follows:

**Language of Courts**

8. All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:

Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

**[46]** Section 3 of the Interpretation Acts 1948 and 1967 (Act 388) is a definition section and it defines "National Language" to mean "the national language provided for by art. 152 of the Federal Constitution."

**[47]** Then there is r. 101 of the Rules of the Court of Appeal 1994 which states as follows:

**101. Document shall be in national language.**

(1) Subject to subrule (2), any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language:

Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

(2) For Sabah and Sarawak, any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language:

Provided that any document in the national language may be used as an exhibit, with or without a translation thereof in the English language.

**[48]** And r. 18(1) of the Rules of the Court of Appeal 1994 clearly states that it is the appellant who shall prepare a memorandum of appeal. Factually speaking, the absence of the memorandum of appeal in the National Language renders the record of appeal filed by the appellant incurably defective and, consequently, the appellant's appeal herein should be dismissed with costs for the simple reason that there is no proper record of appeal before this court. It is as simple as that.

**[49]** The importance of the Malay Language as the national language cannot be taken lightly. Indeed Nik Hashim JC (later FCJ) in *Zainun bte Hj Dahan lwn. Rakyat Merchant Bankers Bhd & Satu Lagi* [1997] 4 CLJ Supp 279, at pp. 281 to 282, emphasised the usage of the Malay Language in our courts in these erudite terms:

> Pemfailan 'notice of motion' ini dalam Bahasa Inggeris bukan sahaja menyalahi A. 92 k. 1 KMT malah ia juga melanggar s. 8 Akta Bahasa Kebangsaan 1963/1967 ('Akta tersebut') yang memperuntukkan:
>
> > Segala prosiding (selain daripada pemberian keterangan oleh seseorang saksi) dalam Mahkamah Agung, Mahkamah Tinggi atau mana-mana Mahkamah Rendah hendaklah dalam bahasa kebangsaan:
> >
> > > Dengan syarat bahawa Mahkamah boleh, sama ada atas kehendaknya sendiri atau atas permintaan mana-mana pihak dalam mana-mana prosiding dan selepas menimbangkan kepentingan keadilan dalam prosiding itu, memerintahkan supaya prosiding itu (selain daripada pemberian keterangan oleh seseorang saksi) dijalankan sebahagiannya dalam bahasa kebangsaan dan sebahagiannya dalam bahasa Inggeris.
>
> Penggunaan Bahasa Melayu di mahkamah tidak boleh dipermudahkan dan diambil ringan. Perlembagaan Persekutuan menetapkan bahasa kebangsaan negara ialah Bahasa Melayu (Perkara 152). Dengan peruntukan undang-undang di atas, maka keraguan atas penggunaan Bahasa Melayu dalam prosiding mahkamah tidak boleh dipersoalkan lagi. Jadi, penggunaannya hendaklah dilaksanakan dengan ketatnya oleh semua pihak. Mahkamah hendaklah memainkan peranannya dengan melaksanakan kuasanya dengan sewajarnya. Kaedah-kaedah Mahkamah termasuk A. 92 k. 1 adalah digubal bukan untuk hiasan tetapi untuk dipatuhi supaya prosiding di mahkamah dapat berjalan dengan sempurna. Ketakpatuhan kepada peraturan atau kaedah-kaedah mahkamah akan membawa prosiding di mahkamah menjadi kelam kabut (*Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420; [1993] 3 CLJ 629).
>
> Permohonan melalui notis usul bukan suatu perkara yang susah atau rumit untuk dibuat dalam Bahasa Melayu. Dalam kes ini, 'notice of motion' sengaja dibuat dan difailkan bersekali dengan afidavit serta pernyataan dalam Bahasa Inggeris tanpa memperdulikan peruntukan A. 92 k. 1 KMT, Akta tersebut dan Perlembagaan Persekutuan. Tidak ada sebab mengapa permohonan

A ini tidak boleh dibuat dalam Bahasa Melayu. Teks yang sahih ialah teks dalam Bahasa Melayu. Sekiranya mahkamah tidak berwaspada dan bertindak dari awal, sudah tentu lampiran 3 ini akan 'terlepas' dan pendengaran permohonan diteruskan tanpa mematuhi kaedah tersebut. Ketakpatuhan undang-undang tidak
B boleh dibiarkan. Permohonan di lampiran 3 adalah sungguh tidak teratur dan ia tidak boleh diterima dan dipertimbangkan oleh mahkamah sama sekali.

**[50]** We categorically say that the mandatory provisions of art. 152 of the Federal Constitution read together with s. 8 of the
C National Language Acts 1963/1967 (Act 32) and s. 3 of the Interpretation Acts 1948 and 1967 (Act 388) must be adhered to. It requires the appellant to file the memorandum of appeal in the National Language. No other language will be entertained. And the failure of the appellant to do so amounts to a blatant breach
D which would compel us to conclude that no memorandum of appeal has been filed at all. The purported memorandum of appeal in the English language must accordingly be rejected outright without further ado. What is mandatory, must be strictly adhered to. Otherwise dire consequences would follow.

E

**[51]** Indeed the salutary advice of Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor. v. Ho Toong Peng & Ors.* [1977] 1 MLJ 120, at p. 121, must be heeded, There his Lordship said:

F There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.

It should I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can
G sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause (*(sic)* (course)) of speedy and efficient administration of justice.

H **[52]** We observe that the word "shall" appears in s. 8 of the National Language Acts 1963/1967 (Act 32). Likewise, the word "shall" also appear in r. 18(1) and r. 101 of the Rules of the Court of Appeal 1994. It is quite obvious that the use of the word "shall" raises a presumption that the particular provision is
I imperative (*State of U.P. v. Manbodhan Lal Srivastava, and Manbodhan Lal Srivastava v. State of U.P.,* AIR [1957] SC 912, at p. 917; *State of Uttar Pradesh and Others v. Babu Ram Upadhya,*

AIR [1961] SC 751, at p. 765; *M/s. Sainik Motors, Jodhpur and Others v. State of Rajasthan,* AIR [1961] SC 1480, at p. 1485; and *Govind Lal Chaggan Lal Patel v. The Agriculture Produce Market Committee and others,* AIR [1976] SC 263, at p. 267), and it is also ordinarily mandatory. It is also correct to say that when a statute uses the word "shall", *prima facie* it is mandatory. And once it is held to be mandatory, the failure to comply with it will invalidate anything done under the statute.

**[53]** Thus, the failure on the part of the appellant to file a memorandum of appeal in Bahasa Malaysia renders the purported record of appeal filed by the appellant useless. It will not qualify as a record of appeal. It is our judgment that there is no proper or competent appeal before us.

**[54]** To confound the matter further, r. 21(2) of the Rules of the Court of Appeal 1994 categorically states that if the memorandum of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.

**[55]** In the same vein, r. 21(3) of the Rules of the Court of Appeal 1994 stipulates that if any part of the record of appeal is not filed, the appeal may be dismissed.

**[56]** In our judgment, the appellant's record of appeal should be struck out and the appeal too ought to be dismissed with costs.

**[57]** In regard to the purported memorandum of appeal in the English language, it is our judgment that it is not valid. To add salt to injury, the purported memorandum of appeal in the English language is also not signed by the appellant's solicitors thereby rendering that purported memorandum of appeal to be invalid and to be of no effect whatsoever.

**[58]** It is significant to note that the purported memorandum of appeal in the English language is undated. The date has been left blank. It reads:

> Dated __ day of August 2007.

**[59]** Be that as it may, the purported memorandum of appeal could not have been dated August 2007 because it was served on the respondent's solicitors only on 28 July 2008. This would simply mean that the purported memorandum of appeal is defective and invalid.

**[60]** The chronology of events too had not been submitted nor served as required under r. 18(10) of the Rules of the Court of Appeal 1994. And the Practice Direction No: 3 of 1992 stipulates, *inter alia*, that:

> Mahkamah Agung Malaysia
> Arahan Amalan No 3 tahun 1992
> Kronologi Peristiwa Kes Sivil
>
> Seorang Perayu apabila memfailkan rekod rayuan di bawah kaedah 62 Kaedah-Kaedah Mahkamah Agung 1980, hendaklah juga memfailkan tujuh salinan kronologi peristiwa kes, bermula dari tarikh kes itu difailkan di mahkamah asal sehingga ke tarikh rekod rayuan difailkan.

**[61]** Siti Norma Yaakob JCA (later the Chief Judge of Malaya) in *Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 3 CLJ 357, CA, aptly said at p. 363 of the report and we gratefully adopt it in this case and this was what her Ladyship said:

> Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54 and *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 MLJ 65.

**[62]** It is our judgment, that the failure on the part of the appellant to file the chronology of events in contravention of r. 18(10) of the Rules of the Court of Appeal 1994 as well as the Practice Direction No: 3 of 1992 points to only one conclusion. It is this. That the appellant's appeal is not properly brought before this court. Therefore, the appellant's appeal should be dismissed forthwith with costs.

**[63]** Everything seems to go wrong with the appellant. And flagrant breaches of the rules seem to be the hallmark of the appellant in this case. It is rather unfortunate. But the law must be strictly adhered to. It is here that the speech of Lord Scarman in *Duport Steels Ltd and Others v. Sirs and Others* [1980] 1 All ER 529, HL, at p. 551, rings true. There Lord Scarman had this to say:

> But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires.

**[64]** Next, the appellant also failed to attach a proper index to Part "C" of the record of appeal with the documentary exhibits not separately indexed. Here, we need to reproduce the Practice Direction No: 2 of 1985 which clearly shows how a record of appeal should be prepared and it would certainly be useful to legal practitioners:

> In order to assist solicitors in the preparation of a record of appeal, the Honourable the Lord President has hereby directed the following guideline:
>
> 1. A record of appeal shall consist of three parts, namely Part 'A', Part 'B' and Part 'C', which must be arranged in the following sequence:
>
> Part 'A' shall contain:
>
> (i) five (5) blank pages;
> (ii) index to the Page;
> (iii) memorandum of appeal;
> (iv) judgment, decree or order appealed from;
> (v) notice of appeal;
> (vi) written judgment or grounds of decision or order; and
> (vii) pleadings and/or summons or motions (where proceedings are commenced otherwise than by writs).
>
> 1.2 Part 'B' shall contain:
>
> (i) index to the Part with a sub-index of the pagination in respect of witnesses referred to in the notes of evidence and of deponents of the affidavits filed and read in the court appealed from;

A (ii) notes of evidence;

(iii) copies of all affidavits filed and read in court appealed from (without their exhibits); the affidavits to be arranged in the order of the dates of their filing.

1.3 Part 'C' shall contain:

B (i) index to the Part; and

(ii) copies of all documentary exhibits put in as evidence or attached to the affidavits filed and read in the court appealed from in so far as they are relevant; where a particular documentary exhibit is attached to the affidavits C of both parties, in order to avoid duplication, thickness and weight and above all, confusion, only one copy of such documentary exhibit should be included, but it must however bear the exhibit's markings of each party. All documentary exhibits shall be separately numbered, separately indexed and arranged in chronological order.

D

**[65]** Here, the appellant had merely described all the documents in Part "C" of the record of appeal as "senarai exhibit" and the documentary exhibits had not been separately indexed. The relevant exhibits in the record of appeal would be exhs. "MM1" E to "MM20" from pp. 1 to 4597. Altogether there were 20 different exhibits with 4597 pages therein. Clearly, it is our judgment that the appellant had failed to comply with the requirements of the Practice Direction No: 2 of 1985 as set out above.

F

**[66]** In *Kerajaan Negeri Pahang Darul Makmur & Anor v. Seruan Gemilang Makmur Sdn Bhd* [2008] 6 CLJ 611, CA, at p. 623, writing a supporting judgment, I had this to say:

G [34] In regard to the Practice Direction No: 1 of 1996, I have this to say. It dealt with the extension of time to file the record of appeal in cases where the notes of proceedings were not available. Recognition has been accorded to Practice Directions in the past by this court. Two case authorities emanating from this court must be cited to show that Practice Directions must be H strictly adhered to, namely:

(a) *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628, CA; and

(b) *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 I CLJ 972, CA.

> [35] The principle of *stare decisis* must be given prominence and be put on a high pedestal. Litigants expect certainty in the law and this court must deliver that certainty, to all and sundry, by following the previous decisions of this court. Consistency and predictability in the law are two famous hallmarks of the doctrine of *stare decisis* and no one can dispute it. In short, like cases will be treated alike.

**[67]** We have no choice. The appellant in clear breach of the Practice Direction No: 2 of 1985 failed to separately index the documentary exhibit in Part "C" of the record of appeal. Such non-compliance was certainly fatal. The record of appeal ought to be struck out forthwith.

**[68]** With vigour and vitality, the learned counsel for the appellant submitted that all these defects could be corrected before the hearing of the appeal. He submitted that the learned counsel for the respondent "as a professional gentleman" should have informed the appellant of the defects and "should not have ambushed us." While accepting that there were defects, yet he submitted that these defects were not fatal. He submitted that the courts now do not, like the old days, go on the issues of technicalities. He further submitted that the case ought to be heard on its merits and that the appellant had enough time to cure the defects. He urged this court to exercise its discretion in favour of the appellant. He submitted that the appellant should be given his day in court.

**[69]** In rebuttal, the learned counsel for the respondent submitted that it was not his duty to educate the learned counsel for the appellant as to how to file a proper record of appeal. He submitted that even encl. 29a merely restricted itself for leave to file a memorandum of appeal in the Malay Language without alluding to the other known defects. He submitted that he was not stealing a march and that he was entitled to raise questions of law in regard to encl. 25a. He pointed out that he was only concerned with the law.

**[70]** There are letters bundled up and marked as exh. "MM2" annexed to the affidavit in support affirmed by the respondent on 1 October 2009. Some of these letters are quite interesting and they are certainly relevant as depicting what the learned counsel for the respondent proposed to do in the near future. We will list down only two relevant letters in its chronological order which have been exhibited:

(a) A letter from the respondent's counsel dated 20 August 2007 sent by hand to the appellant's counsel carrying these words:

> Kindly take notice that if the above Exhibits are not included in the Appeal Record we will consider that the Appeal Record is incomplete and defective and our client will take steps to strike off your client's Appeal.

(b) A letter from the respondent's counsel dated 22 August 2007 sent by hand to the appellant's counsel carrying these words:

> Hence we wish (to) reiterate that if the aforesaid Exhibits are not included in the Appeal Record, we will consider the Appeal Record as incomplete and defective and our client will take the necessary steps to strike off your client's appeal.

**[71]** We are constrained to say that on 20 August 2007 and on 22 August 2007, the learned counsel for the respondent had alerted the learned counsel for the appellant as to the proposed actions that would be taken if the exhibits were not included in the appeal record. Enclosure 25a was dated 2 October 2009 and there was thus ample opportunity for the learned counsel for the appellant to rectify the appeal record, if he wanted to. For the whole year of 2008, the learned counsel for the appellant remained idle. In our judgment, the learned counsel for the respondent "did not ambush" the learned counsel for the appellant in respect of encl. 25a. In our judgment, the filing of encl. 25a was done, in the circumstances, without any malice aforethought.

**[72]** We will now say something about the inherent jurisdiction of this court that was alluded to in the notice of motion in encl. 25a. The inherent jurisdiction of the court has been invoked in an inexhaustible variety of circumstances and the court too is entitled to exercise its inherent jurisdiction in different ways and circumstances. It has a capacity to diversify and it has no limit.

**[73]** We categorically say that the term "inherent jurisdiction of the court" must be differentiated from its statutory jurisdiction. It goes without saying and it is so obvious that the source of the statutory jurisdiction of the court lies in the statute itself, like for instance O. 92 r. 4 of the Rules of the High Court 1980 ("RHC"). While, on the other hand, the source of the "inherent jurisdiction of the court" is derived solely from its very nature that it is a court of law and nothing else; and therefore its range is wider and beyond definition.

**[74]** When the court exercises its inherent jurisdiction, it does so as part and parcel of the process of the administration of justice. It is certainly part of procedural law and not of substantive law (*Connelly v. Director of Public Prosecutions* [1964] AC 1254, HL; and *Regina v. Jefferies* [1968] 3 WLR 830, CA, [1968] 3 All ER 238, CA) and it is usually invoked in the course of litigation.

**[75]** The "inherent jurisdiction of the court" is certainly exercisable by summary process, if the court is minded to. The power of the court to exercise its inherent jurisdiction is the very essence of its existence. It is the life-blood and the attribute of being a court of law. Lord Morris in *Connelly v. Director of Public Prosecutions (supra)* at p. 1301 succinctly said:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

**[76]** We gratefully adopt the illuminating words of Lord Morris and when applied in adjudicating encls. 25a and 29a, we must strictly enforce the need to file court documents in the Malay Language as ordained by the law in this country. In our judgment, pursuant to O. 92 r. 4 of the RHC, the filing of the memorandum of appeal in the English language constituted an injustice to the respondent and it was, pure and simple, an abuse of the process of the court.

## Conclusion

**[77]** We have read all the relevant affidavits. We too have heard the interesting oral submissions of the learned counsel on both sides. We have also read the written submissions submitted to us together with the relevant authorities. We have anxiously perused through encls. 25a and 29a with a fine toothcomb. We deliberated at some length. We discussed thoroughly all the finer points raised by the learned counsel on both sides. We have appropriately and judiciously consider all the provisions of the law in adjudicating encls. 25a and 29a. We are glad to announce that our decision is unanimous.

**[78]** We allow encl. 25a. This would mean that the appellant's record of appeal is struck out and the appellant's appeal is dismissed with costs. Deposit to be paid to the respondent to account of taxed costs.

**[79]** We also dismiss encl. 29a with costs.